

**ORIGINAL**

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
DOCKETS

2003 MAR 25 P 2:27

In the Matter of the

**CITIZENSHIP OF DHL AIRWAYS, INC.**

Docket OST-2002-13089 - 39

**MOTION FOR LEAVE AND REPLY OF DHL AIRWAYS TO  
CONTINGENT MOTION AND ANSWER OF UNITED PARCEL SERVICE**

Communications with respect to this document should be sent to:

**Steven A. Rossum**  
**Senior Vice President - Corporate**  
**Finance & General Counsel**  
**DHL AIRWAYS, INC.**  
**P.O. Box 66633**  
**Chicago, IL 60666-0633**  
**(847) 842-6313**  
**(847) 842-6303 (fax)**  
**srossum@dhlairways.com**

**Stephen H. Lachter**  
**LACHTER & CLEMENTS LLP**  
1150 Connecticut Avenue, N.W.  
Suite 900  
Washington, D.C. 20036  
(202) 862-4321  
(202) 835-3219 (fax)  
lachter@starpower.net

**COUNSEL FOR DHL AIRWAYS, INC.**

**March 25, 2003**

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

---

In the Matter of the

**CITIZENSHIP OF DHL AIRWAYS, INC.**

---

)  
)  
)  
)  
)  
)  
)

**Docket OST-2002-13089**

**MOTION FOR LEAVE AND REPLY OF DHL AIRWAYS TO  
CONTINGENT MOTION AND ANSWER OF UNITED PARCEL SERVICE**

DHL Airways, Inc. ("Airways") opposes the unauthorized "Contingent Motion" and "Answer" filed by United Parcel Service Co. ("UPS") on March 14, 2003<sup>1</sup> requesting that the Department publicly release all of the materials Airways submitted on a confidential basis to facilitate the Department's continuing fitness review of Airways.<sup>2</sup> That review ended with the Department's determination that Airways remains a U.S. citizen,<sup>3</sup> fit to hold a certificate of public convenience and necessity. UPS and Federal Express Corporation ("Federal Express") continue to

---

<sup>1</sup> To the extent the Department may deem it necessary, Airways, pursuant to 14 C.F.R. § 302.6(c), hereby moves for leave to file this reply to UPS's latest unauthorized filing. The Department's acceptance of this reply will not unduly prejudice any party and will enhance the record in this proceeding. More particularly, due process and fundamental fairness dictate that Airways be allowed to file this response.

<sup>2</sup> Airways Reply is limited to the UPS request that the Department release Airways' confidential documents and materials. Airways specifically reserves the right to reply to any other unauthorized answers filed in response to the Department's March 5, 2003 Notice which did not provide for Answers. We note, however, that the comments filed by UPS and Federal Express contain numerous misstatements of fact and law and, to a great extent, are unresponsive to the Department's request for Comments on the Inspector General's correspondence.

<sup>3</sup> See Letter from Assistant General Counsel for International Law Donald Horn to DHL Airways (May 7, 2002).

challenge that decision and this UPS filing adds to the litany of (generally unauthorized) filings harassing Airways and the Department. UPS's "Answer" simply reiterates the same request it has made before on similarly irrelevant grounds, and should be rejected by the Department.

UPS's answer may or may not be frivolous but it surely is disingenuous. UPS knows that its request for publication of Airways' confidential materials is without merit, but if UPS were to succeed in pressuring the Department to grant the request, it would afford UPS, a dominant competitor, unprecedented access to a smaller competitor's sensitive corporate information and provide potentially unlimited additional pretexts for yet more unauthorized pleadings. UPS's filing is correct in at least one respect: as implicitly acknowledged, UPS has no right to obtain Airways' confidential materials. In fact, UPS offers absolutely no basis for the Department to grant such access and violate the confidentiality of Airways' information.

UPS suggests that Airways somehow failed to adhere to the Department's procedural requirements because Airways submitted its confidential materials without filing a motion for confidential treatment in a public docket. UPS refuses to recognize that Airways was not required to make any such public filing to perfect its confidentiality request. Airways submitted its confidential materials as part of an informal, non-public, undocketed process; therefore, there was no public docket in which Airways' confidentiality request could or should have been filed. Airways did, however, explicitly request that the Department withhold from public disclosure all confidential information and documents submitted to the Department

with each submission. As a procedural matter, those requests were entirely valid and, as a matter of substance, Airways is entitled by law to preserve the confidentiality of those materials. Of course, none of this is news to UPS, which, as a certificated air carrier, should be familiar with the Department's long-established informal procedures for reviewing the continuing fitness of such carriers while safeguarding their confidentiality.<sup>4</sup>

UPS, in an astounding statement, also claims that it did not become aware that Airways had submitted confidential materials in conjunction with the Department's informal continuing fitness review until the Department referenced this fact in its March 5, 2003 Notice. This feigned ignorance is mere posturing. The Department and Airways have disclosed the fact that Airways submitted confidential materials in the course of that review and UPS has demanded access to those materials before.<sup>5</sup> *See, e.g. Petition of United Parcel Service Co.* filed in this docket on August 9, 2002 at 4-5, 11 n.29 ("...changes in ownership and management, submitted to the DOT staff review under Section 204.5 should also

---

<sup>4</sup> UPS, like most carriers, presumably has undergone one or more informal continuing fitness reviews since it was initially found fit to hold a certificate of public convenience and necessity. To Airways' knowledge, UPS has never filed a publicly-docketed motion for confidential treatment in conjunction with any such review.

<sup>5</sup> *See* Letter of Norman Y. Mineta, Secretary of Transportation, to the Hon. Ernest F. Hollings, Chairman, Senate Committee on Commerce, Science and Transportation, Docket OST-2002-13089 (Oct. 1, 2002) ("Mineta letter"), at 1 ("Department officials met with DHL Airways officers and counsel on numerous occasions and received documents containing confidential information . . ."); *Answer of DHL Airways, Inc. in Opposition to Request to Commence Enforcement Proceedings*, Docket OST-2001-8736 (Feb. 5, 2001) ("Airways has provided to the Department all relevant information on a confidential basis."); *Motion of DHL Airways for Leave to File an Otherwise Unauthorized Document and Surreply*, Docket OST-2002-13089 (Sept. 26, 2002) ("The determination [of fitness] reflected the Department's detailed examination of documents (including sensitive corporate and financial information) and interviews of officers, directors, and employees of the reorganized company."); *Opposition of DHL Airways to Motion of Federal Express for Leave to File and Contingent Surreply of DHL Airways*, Docket OST-2002-13089 (Oct. 18, 2002) (In the course of the fitness review, Airways "notified the Department of its restructuring plans, met with Department officials on numerous occasions, and provided relevant documents containing confidential information concerning the restructuring.") (emphasis added).

be placed in the Docket on the original application and this be made available to the public for review and comment...").

The facts about Airways' confidential submissions are as follows: the Department, in conjunction with Airways' restructuring, conducted an extensive investigation of Airways' citizenship and fitness, consistent with the Department's long-established procedures. In accordance with established Department procedures and precedents, Airways disclosed proprietary financial and corporate information relating to changes in Airways' ownership to facilitate the Department's fitness review, including information on Airways' business agreements, plans, relationships, and competitive strategies. With each disclosure, Airways requested confidential treatment due to the sensitive nature of the financial arrangements and business plans of Airways. In an effort to provide the Department with complete disclosure of the proposed transactions, Airways submitted this proprietary information on the understanding that it would be held confidential. Secretary Mineta has endorsed the strong policy reasons for such procedures:

Based upon our experience, the Department believes that this approach enhances compliance. Carriers would not be as forthcoming in discussing sensitive business plans before a transaction occurs if they had to do so in public, adversarial proceedings where their competitors would have access to commercially sensitive corporate plans and documents.<sup>6</sup>

---

<sup>6</sup> Mineta letter at 1; *see also id.* at 3; 14 C.F.R. § 204.5(c) (distinguishing between information provided in support of an application for new or amended certificate authority, which must be filed in the public docket, and "information filed in support a certificated or commuter air carrier's continuing fitness to operate under its existing authority in light of substantial changes in operations, ownership or management, which shall be addressed to the Chief, Air Carrier Fitness Division.").

The Department has recognized that its informal continuing fitness review procedures worked well in Airways' case and that Airways' ability to submit confidential materials and engage in a candid dialogue with the Department about business-sensitive matters was a critical element in enabling the success of the Department's review.<sup>7</sup>

UPS asserts that the Department should make Airways' documents public because, as a substantive matter, they do not contain any information eligible for confidential treatment under U.S. law. This claim is entirely speculative and based solely on UPS's interpretation of the information about Airways referenced in the Inspector General's letter. UPS infers that Airways is not entitled to confidential treatment because the IG's discussion concerning Airways' citizenship does not qualify for such treatment.<sup>8</sup> UPS could not be more wrong.

First, the Airways information redacted from the version of the Inspector General's letter initially released in conjunction with the Department's March 5, 2003 Notice was confidential and the Department treated it as such. Second, UPS is not in a position to determine the confidential status of all of the other information provided by Airways based upon the summary information included in

---

<sup>7</sup> See Mineta letter, at 3 ("the case of DHL Airways shows that the current process is working by allowing the Department to obtain information informally to attempt to solve problems with carriers and competitors . . .").

<sup>8</sup> UPS draws a fallacious distinction between documents that relate to proprietary commercial matters (which, UPS asserts, may be entitled to confidential treatment) and citizenship-related materials (which are not). It is absurd to suggest that these two categories are mutually exclusive. In order to review a carrier's citizenship, the Department must evaluate its ownership, management and business arrangements to determine whether the carrier meets the statute's numerical citizenship tests as well as the actual control requirement. In most, if not all cases, this necessarily requires an examination of documents and information that are confidential, proprietary, and commercially sensitive.

the Inspector General's letter.<sup>9</sup> Third, in order for the Department to conduct its review, it needed access to the underlying documents which ultimately resulted in Airways' reorganization. The confidential business nature of these documents remain sensitive; even though they were reviewed by the Department as part of its fitness review. Airways' documents exemplify the type of materials that are eligible for, and routinely are afforded protection from public disclosure under various exemptions to the Freedom of Information Act ("FOIA"), including 5 U.S.C. § 552 (b) (3)<sup>10</sup> and (4).<sup>11</sup>

Airways strongly objects to providing competitors unrestricted access to confidential business information that other U.S. airlines undergoing fitness reviews

---

<sup>9</sup> Needless to say, Airways' consent to publication of the unredacted version of the Inspector General's letter in no way constituted a waiver of Airways' right to preserve the confidentiality of all other materials provided to the Department in the course of its continuing fitness review. See Letter from Counsel for DHL Airways to Department of Transportation, Docket OST-2002-13089 (Mar. 10, 2003) (in which Airways consented to the unexpurgated release of the IG's letter as a good-faith effort to limit the burden on the Department and bring this matter to a prompt conclusion). The documents and materials that Airways submitted to the Department as part of its informal fitness proceeding included confidential, sensitive, and proprietary information that remains exempt from public disclosure.

<sup>10</sup> Exemption 3 shields from disclosure information specifically protected by another federal statute, including 49 U.S.C. § 46311. See Order 2001-10-2, at 2-3. That statutory provision prohibits the release of information acquired by the Department "when inspecting the records of an air carrier." 49 U.S.C. § 46311. The materials at issue here clearly satisfy this requirement. As noted above, Airways submitted, as part of its informal fitness proceeding, sensitive and confidential materials for the Department's review and inspection. Exemption 3 also prevents disclosure of information specifically protected by another federal statute, 49 U.S.C. § 40115. See *British Airports Authority v. CAB*, 531 F. Supp. 408, 414 (D.D.C. 1982). Section 40115 states that the Department "shall" withhold from public disclosure, among other things, information that would adversely affect an air carrier's competitive position in foreign air transportation. The materials at issue here clearly satisfy this standard because they contain sensitive, proprietary information, including Airways' views on its competitive positions and strategic intentions with respect to its competitive position in foreign air transportation.

<sup>11</sup> Exemption 4 protects from public disclosure information that is "(1) commercial or financial, (2) obtained from a person outside the government, and (3) privileged or confidential." *Gulf & Western Indus., Inc. v. United States*, 615 F.2d 527, 529 (D.C. Cir. 1980) (citations omitted). Airways' documents clearly satisfy this standard. All are commercial or financial in nature; they were obtained from a private citizen; and are privileged or confidential. Moreover, these documents contain sensitive and proprietary information, including Airways' views on its competitive positions and its strategic intentions. If disclosed, this information could be used by UPS, a dominant competitor, and others, to Airways' competitive disadvantage.

have been routinely permitted to keep confidential. To make an exception in this case by permitting the public disclosure of Airways' proprietary documents would create an invidious deterrent to other carriers sharing such information with the Department in similar cases in the future, thereby substantially undermining the effectiveness of the continuing fitness review process.<sup>12</sup> Indeed, the Department understands this and thus routinely affords confidential treatment to commercially-sensitive information.

Airways also objects to UPS's request for immediate interim access to Airways' submissions. While any release of its proprietary business information violates Airways' rights to protect its business from competitors, the release of such information at this stage, even subject to restrictions, is inappropriate. The Department has requested and received comments in this docket on that portion of the IG letter addressing the issue of Airway's citizenship. Pending a Department determination, release of Airways' confidential business information would be prejudicial and contrary to current Department procedure.

In conclusion, as the Department is well aware, Airways always has been, is and remains a citizen of the United States within the meaning of the statute. The Department has notified Airways, based upon information and documents provided during the course of Airways' reorganization, that Airways continues to satisfy the

---

<sup>12</sup> See Mineta letter, at 1; see also *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 677-78 (D.C. Cir. 1976) (Public disclosure of confidential information could "impair the Government's ability to obtain necessary information in the future or . . . cause substantial harm to the competitive position of the person from whom the information was obtained.") (quoting *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).



statutory citizenship requirements applicable to U.S. carriers. UPS's request for access to Airways' confidential materials is unprecedented and unfounded. UPS has offered absolutely no justification for the Department to grant such access to any third party, let alone UPS, Airways' dominant competitor. Airways made the appropriate request (in terms of timing, form and content) for the Department to withhold Airways' confidential materials from public disclosure, and applicable federal law specifically exempts those materials from disclosure. Airways therefore requests that the Department continue to respect and safeguard the confidentiality of Airways' materials consistent with controlling federal law.

Respectfully submitted,



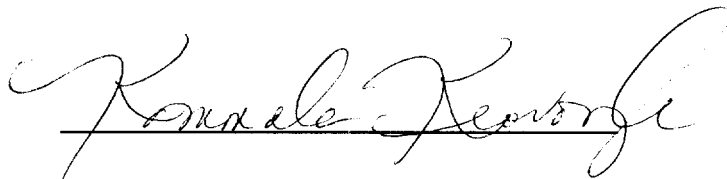
Stephen H. Lachter  
LACHTER & CLEMENTS LLP

**COUNSEL FOR DHL AIRWAYS, INC.**

March 25, 2003

## CERTIFICATE OF SERVICE

I hereby certify that I have served by 1st class mail, copies of the foregoing Comments of DHL Airways, Inc., this 25<sup>th</sup> day of March, 2003 to all persons named on the Service List.



Kommala Keovongphet

David L. Vaughn  
Kelley Drye & Warren, LLP  
Counsel for UPS  
1200 19<sup>th</sup> Street, NW, Suite 500  
Washington, DC 20036

Michael Hart  
President  
Lynden Air Cargo  
6441 So. Airpark Place  
Anchorage, AK 99502

Steven R. Okun  
UPS Public Affairs Manager  
316 Pennsylvania Avenue, SE  
Suite 304  
Washington, DC 20003

Pierre Murphy  
Attorney for Lynden Air Cargo  
1201 Connecticut Avenue, NW  
Suite 550  
Washington, DC 20036

M. Rush O'Keefe, Jr.  
Counsel for Federal Express  
Corporation  
3620 Hacks Cross  
Building B-3d Floor  
Memphis, TN 38125

Bruce H. Rabinovitz  
Wilmer, Cutler & Pickering  
Counsel for DHL Worldwide Express  
2445 M Street, NW  
Washington, DC 20037-1420

Thomas F. Donaldson, Jr.  
Federal Express Corporation  
Legal Department  
3620 Hacks Cross  
Building B-3d Floor  
Memphis, TN 38125

P. Charles Altimari  
Daniel Tenfelde  
United Parcel Service Co.  
1400 No. Hurstbourne Parkway  
Louisville, KY 40223

Patrick Murphy  
Mark Gerchick  
Gerchick-Murphy Associates  
1134 29th Street, NW  
Washington, DC 20007

Fred F. Fielding  
Edwin O. Bailey  
Wiley, Rein & Fielding  
1776 K Street, NW  
Washington, DC 20006

Hon. Kirk Van Tine  
General Counsel  
US Department of Transportation  
400 7<sup>th</sup> Street, SW, Rm 10428  
Washington, DC 20590

Hon. Rosalind A. Knapp  
Deputy General Counsel  
US Department of Transportation, C-2  
400 7<sup>th</sup> Street, SW, Rm 10428  
Washington, DC 20590

Samuel Podberesky  
Asst General Counsel for Aviation  
Enforcement & Proceedings  
Department of Transportation, C-70  
400 7<sup>th</sup> Street, SW, Rm 4116  
Washington, DC 20590

Donald H. Horn  
Asst General Counsel for Intl Law  
US Department of Transportation  
400 7<sup>th</sup> Street, SW  
Washington, DC 20590

Susan McDermott  
Deputy Asst Secretary for Aviation &  
Intl Affairs  
US Department of Transportation  
400 7<sup>th</sup> Street, SW  
Washington, DC 20590

Hon. Read Van de Water  
Asst Secretary for Aviation &  
International Affairs  
Department of Transportation  
400 7<sup>th</sup> Street, SW, Rm 10232  
Washington, DC 20590